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In the Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF FORMER CORRECTIONS ADMINISTRATORS AND EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ARTHUR LOEVY
JON LOEVY*
ROSHNA BALA KEEN
STEVEN ART
DAVID B. OWENS
SARAH GRADY
Loevy & Loevy
312 N. May St.
Chicago, IL 60607
(312) 243-5900
jon@loevy.com

Counsel for Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner

March 9, 2015

*Counsel of Record

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INTEREST OF *AMICI CURIAE*

Amici curiae are former corrections administrators, supervisors, and experts who have first-hand experience establishing and administering policies on the use of force in state and local correctional settings.[1]

John Clark was the Assistant Director of the Federal Bureau of Prisons between 1991 and 1997. From 1989 to 1991, Mr. Clark was the Warden of the U.S. Penitentiary Marion, the highest-security federal prison in the United States. Mr. Clark has more than 40 years of experience in the field of corrections.

Justin Jones was the Director of the Oklahoma Department of Corrections from 2005 to 2013. Mr. Jones has worked in the field of corrections for more than 35 years.

Chase Riveland was the Executive Director of the Colorado Department of Corrections between 1983 and 1986 and Secretary of the Washington State Department of Corrections from 1986 to 1997. Mr. Riveland has more than 40 years of experience in the field of corrections.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

Jeffrey Schwartz is the Founder and Chief Executive Officer of LETRA, Inc., a non-profit organization concentrating on corrections training and research. Mr. Schwartz has more than 30 years of experience working in correctional facilities, including experience as a court-appointed monitor tasked with implementing use-of-force policies. Mr. Schwartz has written state and local use-of-force policies, and he has trained staff on use of force in many jurisdictions.

Phil Stanley was Commissioner of the New Hampshire Department of Corrections between 2000 and 2003. Mr. Stanley has 40 years of experience in the field of corrections.

Eldon Vail was Secretary of the Washington State Department of Corrections between 2007 and 2011. He has been the superintendent of three adult correctional institutions and has worked at various levels of correctional administration for more than 35 years. Mr. Vail is currently a correctional consultant and expert witness on correctional issues.

SUMMARY OF ARGUMENT

As former corrections administrators and experts, *amici* have first-hand experience establishing and administering policies on the use of force in state and local correctional settings. There is consensus among corrections administrators and experts that an objective standard should be used in the written policies, training, oversight, and disciplinary procedures that govern use of force by correctional staff. The

consensus is that this objective standard should be used for all incarcerated persons, including pretrial detainees and convicted prisoners.

Actual practice in jails reflects corrections professionals' view that objective standards are best. Jurisdictions across the country have adopted objective standards for evaluating whether use of force against pretrial detainees is appropriate. Most of the largest jails in the United States apply objective rules to correctional officers' use of force. In addition, States with large populations of pretrial detainees similarly require that jails implement objective standards governing the use of force. Training, oversight, and discipline of correctional officers who use force are also grounded in objective principles. Accordingly, adopting an objective constitutional standard to govern the use of force against pretrial detainees will not conflict with the legal presumptions on which jails in the United States operate already or alter the policies and procedures governing use of force in those jails.

The use of excessive force is a critical issue confronted by all jails. Repeated instances of excessive force in a facility can create a culture of violence, and without objective written rules to enforce, there is often no mechanism by which to hold corrections officers accountable for inappropriate uses of force. The Executive Branch in recent years has found pervasive excessive force in some jails. To combat these problems, the U.S. Department of Justice (DOJ) has required these institutions to meet objective standards for the use

of force. These efforts to remedy uses of excessive force will be hindered by a constitutional standard that considers a correctional officer's subjective mental state when evaluating whether the use of force against detainees was appropriate. In addition, a subjective analysis likely will have a corrosive effect on staff accountability in most jails.

For these reasons, *amici*'s considered view is that an objective standard for evaluating correctional officers' use of force against pretrial detainees will reflect the current consensus on best practices and the standards that are currently used by local jails. In addition, an objective standard will provide the clearest guidance to local corrections facilities, officials, and employees who wish to comply with the Constitution when they must use force to control pretrial detainees.

ARGUMENT

This Court should adopt an objective standard for evaluating claims of excessive force brought by pretrial detainees. In addition to being the constitutionally proper standard, an objective rule comports with the current consensus among corrections professionals about best practices for promulgating use-of-force policies. Moreover, an objective constitutional standard will match the vast majority of written use-of-force policies adopted by jails across the United States. Finally, an objective standard will provide correctional facilities with a more effective means of curbing the use of excessive force against pretrial detainees.

I. THERE IS CONSENSUS IN THE CORRECTIONS PROFESSION THAT OBJECTIVE STANDARDS SHOULD GOVERN USE OF FORCE AGAINST PRETRIAL DETAINEES

There is widespread agreement among corrections administrators and experts that policies governing correctional officers' uses of force—including training and discipline relating to the use of force—must be based on objective standards that take into account the circumstances confronted by the officer but not that officer's state of mind in deciding whether force should be used.

For example, the American Correctional Association—the oldest association of practitioners in the correctional profession and author of model corrections guidelines since 1870—has promulgated *Performance-Based Standards for Adult Local Detention Facilities* that are entirely objective when it comes to use of force.[2] These standards, which establish "mandatory practices" for the profession, do not provide any leeway for consideration of subjective intent. AMERICAN CORRECTIONAL ASSOCIATION, PERFORMANCE-BASED STANDARDS FOR

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[2] A report supported by the National Institute of Corrections of the DOJ calls these standards "perhaps the most widely recognized professional standards. Many states and other professional organizations have modeled their standards after those developed by ACA." MARK D. MARTIN & PAUL KATSAMPLES, U.S. D.O.J., NAT'L INST. OF CORRECTIONS, SHERIFF'S GUIDE TO EFFECTIVE JAIL OPERATIONS 20 (2007).

ADULT LOCAL DETENTION FACILITIES, Standard 2B, at 32 (4th ed. 2004).

Similarly, the model use-of-force policy issued by LETRA—a non-profit organization concentrating on corrections and a frequent collaborator with the National Institute of Corrections—states that the "type and amount of force used shall be reasonable given the situation and the correctional objective to be achieved." LETRA, Inc., *Model Use of Force Policy* § 6.0.4 (Oct. 29, 2014), *available at* http://www.loevy.com/Kingsley/Amici/LETRA-Model-Use-of-Force-Policy.pdf. This model policy also provides that the force used "must be minimal," and that officers use "only that amount of force which is sufficient to overcome the resistance." *Id.* § 7.0.5.[3]

Consistent with this national consensus among corrections professionals, court-appointed monitors have required for decades that jails adopt objective standards governing the use of force against pretrial detainees. In 1979, the State of Georgia established a "Jail Standards Study Commission,"

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[3] The American Bar Association has likewise promulgated model standards for the use of force against confined individuals. The ABA standard, which does not distinguish between pretrial detainees and convicted prisoners, uses an objective rule that does not permit consideration of the mental state of the officer. American Bar Association, Standards for the Treatment of Prisoners, at 23-5.6, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-5.6.

supported by grants from the DOJ, which published minimum standards for jail facilities in the State. GEORGIA JAIL STANDARDS STUDY COMMISSION, MINIMUM STANDARDS FOR GEORGIA JAIL FACILITIES (1979), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/72154NCJRS.pdf. The Commission's standard for use of force in jails does not include a subjective element and focuses only on objective factors. See *id.* § 4.23.

More recently, in *Rosas, et al., v. Baca*, No. 12 C 428 (C.D. Cal., pending 2015), court-appointed monitors of the Los Angeles Sheriff's Department issued an implementation plan as part of the settlement of a lawsuit concerning officers' pervasive use of excessive force in the Los Angeles County Jail. See Implementation Plan, *Rosas v. Baca*, No. 12 C 428 (C.D. Cal., pending 2015), *available at* http://www.lacounty.gov/files/rosas.pdf. The implementation plan is explicit that staff may use only "the amount of force that is necessary and objectively reasonable to overcome the resistance[.]" *Id.* § 2.2. Nowhere does the implementation plan reference the officer's subjective intent or recklessness in connection with the use of force against detainees. See *id.*

These examples represent the current and well-established thinking among corrections professionals about the best policies for use of force in jails. Each of the models just discussed prohibits objectively unreasonable force. In no instance is there an exception carved out to justify a jailer's unreasonable use of force undertaken with a mental state short of recklessness. In *amici*'s view,

the well-established measure of appropriate uses of force in the jail setting is whether the force is objectively reasonable under the circumstances.

II. JAILS NATIONWIDE ALREADY USE OBJECTIVE STANDARDS FOR USE OF FORCE

Consistent with the professional consensus, correctional institutions throughout the nation currently use an "objective reasonableness" standard to evaluate whether use of force against a detainee is appropriate, as Petitioner points out in his brief. See Pet. Br. 26 & n.7.

1. Almost all jails have written policies governing jailers' use of force, and an objective standard is nearly universal in these written policies. To put that in perspective, there are roughly 750,000 pretrial detainees in the United States on any given day. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), at 2, *available at* http://www.bjs.gov/content/pub/pdf/cpus13.pdf.[4] The 10 most populous jails in the country account for approximately 12 percent of the total national jail population. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, ANNUAL SURVEY OF JAILS, 2013 (2015), *available at*

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[4] The DOJ's most recent count is 731,200 pretrial detainees as of June 30, 2013. *Id.*

http://doi.org/10.3886/ICPSR35517.v1.[5] These most populous jails consistently impose on their employees an objective standard for using force against pretrial detainees.[6]

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[5] These 10 facilities together had a jail population of 90,113 as of June 30, 2013. *Id.* They are the Los Angeles County Jail (18,433 pretrial detainees as of June 30, 2012), the New York City Department of Corrections (Rikers Island) (11,518), the Cook County Jail in Chicago (10,428), the Harris County Jail in Houston (9,297), the Philadelphia Prison System (9,028), the Maricopa County Jail in Phoenix (8,057), the Orange County Jail in Santa Ana, California (6,924), the San Bernardino County Jail (6,018), the San Diego County Jail (5,459), and the Miami-Dade County Correctional and Rehabilitation Facility (4,951). *Id.*

[6] Each of the 10 largest jails has adopted an objective standard governing the use of force. For the policies among these that are publicly available, see:

- Los Angeles County Jail, Use of Force Policy §§ 3-10/005.00 & 3-10/020.00-030.00, *available at* http://shq.lasdnews.net/content/uoa/EPC/force-policy.pdf ("Department members shall use only that force which is objectively reasonable.");
- The City of New York, Department of Correction, Directive 5006R-C, *available at* http://www.loevy.com/Kingsley/Amici/New-York-Department-of-Corrections-Use-of-Force-Policy.pdf ("It is expressly prohibited to use more force than is necessary to restrain the inmate, control the situation or protect oneself or others.");
- Cook County Sheriff's Office Orders, Order No. 11.2.1.0, Response to Resistance/Use of Force Policy, *available at* http://www.loevy.com/Kingsley/Amici/Cook-County-Use-of-Force-Policy.pdf ("Officers shall use an amount of force reasonable and necessary based on the totality of the circumstances to perform a lawful task, effect an arrest, overcome resistance, control a subject, or protect the officer(s)

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or others from injury, as specified by federal/Illinois statutes and case law.");

- Harris County Sheriff's Office Department Manual, Chapter III §§ 1.0(A)(10)-(11) & 1.0(B), *available at* http://www.loevy.com/Kingsley/Amici/Harris-County-Use-of-Force-Policy.pdf (establishing that "[a] Deputy is justified in using force against another when and to the degree the Deputy reasonably believes the force is immediately necessary to accomplish lawful objectives," and defining "reasonable belief" as "[a] belief that would be held by an ordinary and prudent person in the same circumstances as the acting person.");
- Philadelphia Prisons Policies & Procedures, Policy No. 3.A.8, *available at* http://www.loevy.com/Kingsley/Amici/Philadelphia-Prisons-Use-of-Force-Policy.pdf (defining "excessive force" as "the application of an unreasonable amount of force beyond what is necessary in a given incident based on the totality of the circumstances");
- Maricopa County Sheriff's Office, Policy & Procedure, Policy No. CP-1, *available at* http://www.loevy.com/Kingsley/Amici/Maricopa-County-Use-of-Force-Policy.pdf ("The purpose of this policy is to provide officers with guidelines on the authorized use of force or control that objectively reasonable officers would apply in the performance of their lawful duties.");
- San Diego County Sheriff's Department, Policy and Procedure Manual, Procedure Section, Rule 2.49, *available at* http://www.sdsheriff.net/documents/pp-20150115.pdf ("Employees shall not use more force in any situation than is reasonably necessary under the circumstances."); and
- Miami-Dade Corrections and Rehabilitation Department, Department Standard Operating Procedure No. 11-041, *available at* http://www.fla-pac.org/reply_docs/f_506/DSOP%20response%20to%20resistance.pdf (defining "appropriate force" as "[t]he amount of physical control reasonably necessary to gain control of a subject").

The San Diego County Jail's Policy & Procedure Manual, for instance, instructs that correctional officers "shall not use more force in any situation than is reasonably necessary under the circumstances." San Diego Sheriff's Office, Policy & Procedure Manual, Procedure Section, Rule 2.49, *available at* https://www.sdsheriff.net/documents/pp.pdf. In extended "Use of Force Guidelines" that form an addendum to the written policy, the San Diego County Sheriff again emphasizes that officers should "choose the available force option, which is reasonable and necessary for the circumstances at the time." *Id.* at Addendum Section F. The guidelines also set forth factors that correctional officers should consider when determining what level of force to apply. *Id.* Those factors include the age of the detainee, his physical characteristics and condition, and the act that the detainee intends to carry out. *Id.* The addendum does not take into account the correctional officer's subjective intent. *Id.* On the contrary, it provides instructions on particular steps that correctional officers must take in response to a wide variety of situations in which use of force may be necessary. In so doing, the written policies remove the correctional officer's subjective intention from the analysis of whether force should be used.

Similarly, the Philadelphia Prison System has instituted an objective use-of-force policy, requiring officers to use only that force which is reasonable and necessary based on the totality of the circumstances to perform a lawful task. See Philadelphia Procedures, *supra* n.6. This jail policy defines "excessive force" as "the application of an

unreasonable amount of force beyond what is necessary in a given incident based on the totality of the circumstances." *Id.* Again, the rule does not take into account the subjective intent of the officer applying force.

Likewise, the Cook County Jail in Chicago—one of the largest single-site pretrial detention facilities in the country—has instituted an objective use-of-force policy. This policy, like others, instructs officers to use only the force reasonable and necessary based on the totality of the circumstances. Cook County Orders, *supra* n.6.

In smaller jails, too, written policies governing the use of force impose an objective standard. At the Bexar County Jail in San Antonio, Texas, correctional officers are required to use an "amount and degree of force which is reasonable and necessary, under the circumstances." Bexar County, Texas, Sheriff's Office, Manual of Policy and Procedures § 9.02, *available at* http://images.bimedia.net/documents/SHERIFFS+policy+and+procedure.pdf. Bexar County's written policies allow the use of force only when it is necessary to accomplish a legitimate purpose, such as protection of other detainees from unlawful violence. *Id.* Although the Bexar County policies recognize that there are a "boundless variety of situations" in which correctional officers can appropriately use force, the use-of-force policies do not permit consideration of the responding officer's state of mind whatsoever. *Id.* §§ 9.01-9.02. Many

other jurisdictions have promulgated similar standards.[7]

2. Many States direct their jails by statute or regulation to adopt objective standards governing the use of force. Texas, Pennsylvania, Georgia, and Illinois have some of the most populous jails, and together house more than 15 percent of all pretrial detainees in the nation.[8] Each of these States

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[7] *E.g.*, Boulder County, Colorado, Sheriff's Office, Policy and Procedures Manual § 502, Use of Force, *available at* www.bouldercounty.org/doc/sheriff/bcsopolicy.pdf; Daviess-DeKalb Regional Jail, Missouri, Policy and Procedure Manual, Chapter 20.1, Offender Management—Use of Force and Restraints, *available at* http://ddcrj.com/linked/policy%20and%20procedure%20manual.pdf; El Paso County, Texas, Sheriff's Office, Policy and Procedure Manual, No. 501, Use of Force, *available at* http://www.epcsheriff.com/sites/default/files/assets/Documents/Policy/500/501_Use_of_Force.pdf; Pima County, Arizona, Sheriff's Department Rules and Regulations, Chapter 3, Major Policies, *available at* http://www.pimasheriff.org/index.php/download_file/-/view/40/?phpMyAdmin=IPNjP5VxgDObOoAA8mhIHjviA26&phpMyAdmin=dinbYJEBiCOx0uBqCPRcFtH7KOc; Placer County, California, Sheriff's Office, Corrections Division Policy Manual § 1-10, *available at* http://www.loevy.com/Kingsley/Amici/Placer-County-Use-of-Force-Policy.pdf; Solano County, California, Use of Force Policy, Practices & Procedures § 9.13, *available at* http://www.loevy.com/Kingsley/Amici/Solano-County-Use-of-Force-Policy.pdf; Whatcom County, Washington, Code § 1.28.110, *available at* http://www.codepublishing.com/wa/whatcomcounty/html/whatco01/Whatco0128.html#1.28.110.

[8] These States had a total jail population of 117,149 as of June 30, 2013. Texas had 38,797 pretrial detainees on that date; Pennsylvania had 33,056; Georgia had 28,634; and

requires its jails to adopt objective standards governing the use of force against pretrial detainees. See VERNON'S TEX. CODE ANN., Penal Code § 9.53 ("An officer or employee of a correctional facility is justified in using force against a person in custody when and to the degree the officer or employee reasonably believes the force is necessary to maintain the security of the correctional facility, the safety or security of other persons in custody or employed by the correctional facility, or his own safety or security."); Penn. Admin. Code § 95.241(2)(i) ("Force shall be restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to effect compliance with the rules and regulations of the facility when other methods of control are ineffective or insufficient and only the least amount of force necessary to achieve that purpose is authorized."); GA. JAIL STANDARDS COMM'N, *supra*, § 4.23 ("Facility policy shall restrict the use of physical force by facility personnel to that amount necessary for justifiable self-protection, protection of property and prevention of escapes . . . ."); Ill. Admin. Code § 701.140(k) ("The least force necessary under the circumstances shall be employed.").

Illinois had 16,662. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, ANNUAL SURVEY OF JAILS, 2013 (2015), *available at* http://doi.org/10.3886/ICPSR35517.v1.

Other States have implemented similar objective standards governing the use of force in jails statewide. See, *e.g.*, Department of Rehab. & Corr., Standards for Jails in Ohio, Rule 5120:1-8-08(10), *available at* http://www.drc.ohio.gov/web/2014JailStandards.pdf; Neb. Admin. Code § 81.003.03A; Maryland Comm'n on Correctional Standards, Adult Detention Center Standards Manual § .01(A), *available at* http://www.dpscs.state.md.us/publicinfo/publications/pdfs/MCCS/StandardsManual-ADC-02-2012.pdf.

3. Consistent with best and actual practices, the federal government also has adopted objective use-of-force standards for pretrial detainees. The *Use of Force and Application of Restraints Policy* for the Federal Bureau of Prisons limits use of force to "only that amount of force necessary" to achieve a specific, enumerated objective, such as gaining control of the inmate or protecting another inmate's safety. U.S. DEP'T OF JUSTICE, *Use of Force and Application of Restraints*, Policy No. P5566.06 (Nov. 30, 2005). The implementing information for this regulation, which recognizes that jailers need "guidance and instruction on appropriate procedures when confronted with situations that may require the use of force to gain control of an inmate," makes clear that "[a]n employee may not use brutality, physical violence, or intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate." *Id.* Again, objective language governs whether use of force against a pretrial detainee is appropriate, and the written policies do not take account of the officer's subjective state of mind. See *id.*

In its supervisory role, the DOJ has consistently advised local jailers that evaluation of uses of force should be based on an assessment of whether the response to a threat was reasonable—a proportional use of force—rather than the officer's intent. For example, the DOJ's first findings issued in relation to inappropriate uses of force at the Orleans Parish Jail in New Orleans, Louisiana state: "Generally accepted correctional practices provide that appropriate uses of force in a given circumstance should include a continuum of interventions, and that the amount of force used should not be disproportionate to the threat." Letter from Loretta King, Acting Assistant Attorney General, Civil Rights Division of the U.S. Department of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff (Sept. 11, 2009) ("Orleans Parish Letter 1"), *available at* http://www.justice.gov/crt/about/spl/documents/parish_findlet.pdf. This view was set out again when Orleans Parish failed to adequately reform its jail. See Letter from Jonathan M. Smith, Chief, Special Litigation Section, Civil Rights Division of the U.S. Department of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff (Apr. 23, 2012) (requiring that "any force used be proportionate to the threat posed by the prisoner") ("Orleans Parish Letter 2"), *available at* http://www.justice.gov/crt/about/spl/documents/parish_update_4-23-12.pdf.

Other federal agencies have set objective standards for the use of force as well. The Department of Homeland Security, which oversees the detention of immigration detainees, has adopted a similar objective standard, grounded in

"reasonableness," which governs the use of force against those detainees. See, *e.g.*, U.S. Immigration and Customs Enforcement, National Detention Standards, at 1 (2000), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/useoffor.pdf ("When a detainee acts violently or appears on the verge of violent action(a), if necessary, staff shall use reasonable force and/or restraints to prevent him/her from harming self, others, and/or property.").

4. A natural consequence of the promulgation of objective written policies governing the use of force against detainees is that jailers who must use force are already trained, supervised, and disciplined based on objective standards. They are taught to constrain their use of force to the minimum amount necessary based on the facts before them. When uses of force are deemed unreasonable in light of legitimate goals, correctional officers are disciplined by superiors.

The undersigned *amici* are unaware of any correctional institution in the nation that considers whether the correctional officer acted recklessly in deciding whether a use of force violated policy and requires discipline. A disciplinary process that considers subjective intent would create inconsistent outcomes and compromise correctional institutions' ability to supervise staff effectively. Uniform application of an objective standard will help to ensure that force is managed in jails.

Most importantly, the near uniformity of objective standards for use of force in the written policies of jails throughout the country means that

adopting the Petitioner's proposed objective standard will not upset the operation of local correctional facilities.

III. OBJECTIVE STANDARDS HELP TO ENSURE ACCOUNTABILITY IN JAILS WHERE EXCESSIVE FORCE IS A PROBLEM

Despite both widespread professional consensus that objective standards should govern the use of force against detainees and the implementation of those standards in jails across the nation, there are routinely instances where officers use excessive force against detainees. In some institutions, uses of excessive force are ubiquitous and deeply rooted in the facility's history and culture. Those situations often require outside intervention, typically by the courts or the DOJ. Reform of such systemic failures is achieved by enforcing objective use-of-force standards. In addition, even in situations where excessive force is not pervasive, institutions rely on objective standards to ensure staff accountability. This Court would hinder reform efforts and undermine jail oversight by using subjective criteria to evaluate whether a correctional officer's use of force violates the Constitution.

1. Monitors charged with reforming jails where excessive force is endemic routinely implement objective use-of-force standards to bring about improvements. In New Orleans, as discussed above, the DOJ has twice found that there is a pattern of excessive force at the jail. See Orleans Parish Letter 1, *supra*, at 7-10; Orleans Parish Letter 2,

supra, at 8-10. In this context, the DOJ described the problem with a subjective standard: "staff are left to their own subjective interpretations, which results in inconsistent use and reporting on use of force." Orleans Parish Letter 1, *supra*, at 8. The introduction of subjective standards governing the use of force invites uncertainty and individualized discretion, which is fertile ground for unchecked abuses. Objective standards, by contrast, are a bulwark against the repeated use of excessive force.

As in New Orleans, federal monitors recently have intervened to stop widespread use of excessive force against detainees at jails in the nation's two largest cities—New York and Los Angeles. In both cases, efforts to curb excessive force focus on enforcement of objective standards. The implementation plan for the Los Angeles County Jail, described above, called for an objective standard, see Implementation Plan, *supra*, and now the jail's policy governing the use of force restricts force to "that which is objectively reasonable." L.A. County Jail, Use of Force Policy, *supra* n.6, § 3-10/020.00. In fact, the policy prohibits "unreasonable force," which is defined as "force that is unnecessary or excessive given the circumstances presented to Department members at the time the force is applied." *Id.* § 3-10/030.00.

Similarly, in New York, federal authorities found that "Rikers staff utilize[d] physical force to punish adolescent inmates for real or perceived misconduct and as a form of retribution, in violation of the Department's policy." Letter from Jocelyn Samuels, Acting Assistant Attorney

General, Civil Rights Division of the U.S. Department of Justice and Preet Bharara, U.S. Attorney for the Southern District of New York, to Bill de Blasio, Mayor of New York (Aug. 4, 2014), *available at* http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf. In response, the DOJ advised staff to "strengthen the department's use of force directive" by enforcing objective standards that limit force to "reasonable method[s] of control" and provide that "the force must be proportionate to the threat." *Id.*

Common among these reform efforts is an effort to remove a correctional officer's subjective consideration from the calculation of whether to use force. Adopting a more permissive constitutional standard for the use of force against detainees—one that considers the mindset of the correctional officer—will undermine these and similar reform efforts. In fact, adopting a subjective constitutional standard for using force against detainees risks undoing substantial reforms that have successfully limited the use of force in our county's jails, improving staff and detainee safety.

2. Clear, enforceable standards ensure that jail staff members know what they can and cannot do, and they guarantee that officers who use excessive force can be held accountable for their actions. Accountability, in turn, prevents systemic problems with the use of excessive force—such as those seen in New York, Los Angeles, and New Orleans—and it protects against the spread of such systemic abuses to other institutions.

Adopting a subjective constitutional standard for evaluating the use of force against detainees will upset jail staff training, oversight, and discipline. Most immediately, a subjective constitutional rule will interference with the safe administration of jails because of its negative effect on staff accountability. For one, a subjective standard is more difficult to enforce because it is vague and invites individual discretion. These problems are the reason that appointed monitors always implore jails to develop clear, objective policies dictating when force is permitted and when it is not. See, *e.g.*, Samuels Ltr., *supra*, at 53.

In addition, a subjective standard would erode staff accountability because instances of excessive force would be more difficult to discipline. If a jail staff member can cure an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice, then a new and formidable barrier to staff accountability will have been erected. Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions. *Amici* expect that instances of excessive force in jails would only increase if the constitutional standard for using force against pretrial detainees is based on subjective intent.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of the Petitioner.

Respectfully submitted,

ARTHUR LOEVY
JON LOEVY*
ROSHNA BALA KEEN
STEVEN ART
DAVID B. OWENS
SARAH GRADY
Loevy & Loevy
312 N. May St.
Suite 100
Chicago, IL 60607
(312) 243-5900
jon@loevy.com

Counsel for Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner

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*Counsel of Record